Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	WC Docket No. 07-245
Implementation of Section 224 of the Act;	)	RM 11293
Amendment of the Commission's Rules and	)	RM 11303
Policies Governing Pole Attachments	)	

REPLY COMMENTS OF

segTEL, INC.
THE ZAYO BANDWIDTH ENTITIES
360NETWORKS (USA), INC.

Andrew D. Lipman
Charles A. Rohe
Brett P. Ferenchak
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

Counsel for
segTEL, Inc.
The Zayo Bandwidth Entities
360networks (USA), Inc.

Dated: April 22, 2008

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SUMMARY

The comments submitted in response to the *Notice of Proposed Rulemaking* sound a consistent theme - the Commission's current pole attachment regime is in desperate need of reform. At the outset, it must be emphasized that the overwhelming record in this proceeding stresses the need for the Commission to establish a uniform pole attachment rate, as the distinctions between the services of cable providers and telecommunications companies are becoming fewer. Significantly, there has been no data submitted in the record suggesting that telecommunications attachments result in costs to the pole owner that are any different than any other types of wireline communications facility. The rates telecommunications carriers pay for attachments however, are markedly higher than cable providers - in some cases 200 to 300 percent higher.

The Commission also should not allow ILECs and their affiliates to benefit from regulated rates under Section 224. ILECs, like the electric utilities who have near monopoly power, would gain an overall cost advantage by being able to pick between arm's length negotiation with a pole owner and reliance on the formula, depending on which would be most advantageous in a particular circumstance. Competitive telecommunications companies cannot duplicate that advantage. If the Commission however, determines that ILECs are entitled to such rates, the benefit should apply strictly to poles and not to conduit.

Lastly, there is widespread support for the adoption of "best practices." To the benefit of competition, the adoption of the "best practices" will reduce the costs and time for telecommunications carriers to establish facilities-based networks that will compete with ILECs, and is essential to promote the Commission's significant interest in the deployment of competitive facilities.

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I. INTRODUCTION

The abundance of comments filed in this proceeding, virtually all of which recommend some form of change, is evidence that the current pole attachment regime is in need of reform. The weight of arguments in this proceeding favors the following conclusions:

- There should be a unified maximum rate for attachments to poles, and it should be based on the current formula for cable operators.
- Incumbent local exchange carriers and their affiliates should not be allowed to benefit from regulated rate protection under Section 224. However, if the Commission determines that ILECs are entitled to such protection, the benefit should apply only to poles, and not conduit.
- Equal to the problem of high attachment rates is the costly engineering and make-ready policies that pole owners impose on attaching parties and the delay associated with complying with those policies. Accordingly, the Commission should adopt by rule the "best practices" that were proposed in this proceeding. However, the Commission should also recognize that these best practices are only a beginning, and should be

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[1] The "Zayo Bandwidth Entities" include the following affiliated entities: Zayo Bandwidth Northeast, LLC, Zayo Bandwidth Northeast Sub, LLC, Zayo Bandwidth Indiana, LLC, Zayo Bandwidth Tennessee, LLC, Zayo Bandwidth Central, LLC, and Zayo Bandwidth Central (Virginia), LLC. Descriptions of the Zayo Bandwidth Entities were provided in their Comments filed in this proceeding on March 7, 2008.

followed up with workshops, because numerous comments were submitted that suggest additional problems and proposed practices that would lead to solutions.

II. DISCUSSION:

A. The Commission Should Establish A Unified Maximum Rate For Attachments To Poles Based On The Current Formula For Cable Television Companies

Support for a uniform pole attachment rate is a common theme in most of the comments submitted.[2] In the opinion of numerous commenters, the Commission should eliminate the disparate cost methods for cable operators and telecommunications carriers, and establish a single rate that applies to both types of service provider.[3] The logic behind this opinion is easy to understand: the distinctions between the services of cable providers and telecommunications companies are becoming fewer. AT&T, in its comments, notes that in today's broadband market, cable operators and providers of telecommunications services offer the same or similar broadband services and compete for the same customers.[4]

Knology, a company that offers both cable and broadband services, together with traditional telecommunications services in some regions of the country, notes in its comments that where it offers traditional telecommunications services, its pole attachment costs are 200 to

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[2] *See, e.g.*, Comments of Time Warner Telecom, Inc., One Communications Corp. and COMPTEL ("TWTC/One/COMPTEL"), WC Docket No. 07-245 *et al.*, at 3 (filed Mar. 7, 2008) ("TWTC/One/COMPTEL Comments"); Comments of CenturyTel, Inc. Comments WC Docket No. 07-245 *et al.*, at 12-14 (filed Mar. 7, 2008) ("CentryTel Comments"); Comments of Zayo Bandwidth Entities ("Zayo Bandwidth Entities"), WC Docket No. 07-245 *et al.*, at 6 (filed Mar. 7, 2008) ("Zayo Bandwidth Entities Comments"); Comments of AT&T Inc. ("AT&T"), WC Docket No. 07-245 *et al.*, at 13 (filed Mar. 7, 2008) ("AT&T Comments"); Comments of Frontier Communications, Inc. ("Frontier"), WC Docket No. 07-245 *et al.*, at 5 (filed Mar. 7, 2008) ("Frontier Comments"); Comments of Knology, Inc., ("Knology"), WC Docket No. 07-245 *et al.*, at 3-8 (filed Mar. 7, 2008) ("Knology Comments"); Comments of Qwest Communications International ("Qwest"), WC Docket No. 07-245 *et al.*, at 3-6 (filed Mar. 7, 2008) ("Qwest Comments"); Comments of Edison Electric Institute & Utilities Telecom Council ("EEI/UTC"), WC Docket No. 07-245 *et al.*, at 118 (filed Mar. 7, 2008) ("EEI/UTC Comments").

[3] *See, e.g.*, Zayo Bandwidth Entities Comments at 6.

[4] AT&T Comments at 11.

300 percent higher.[5] This disparity is not at all unusual. No commenter, anywhere in the record, suggests that telecommunications attachments result in costs to the pole owner that are any different than any other types of wireline communications facility, but the rates telecommunications carriers pay for attachments are markedly higher than cable providers.

The disadvantages of this distorted rate regime are analyzed by a number of the commenters. Alabama Power Company, Gulf Power Company and Mississippi Power Company, in their jointly submitted comments, assert that disparate rates can cause "distortion of market forces."[6] Similarly, AT&T submits that under the current regulatory regime, competing broadband providers pay different rates based solely upon their status, an arrangement that "is not in the public interest as it creates distortions in the marketplace that may harm consumers."[7] In this one respect, the comments by traditional pole owners do not differ from those of competitive telecommunications carriers. For example, the Zayo Bandwidth Entities note in their comments that "a single rate for cable operators and Telecommunications Carriers ... would promote the deployment of services on multiple platforms to compete with the ILECs."[8] In general, these statements mirror the preliminary conclusions of the Commission, as expressed in the *Notice of Proposed Rulemaking*.[9] However, some cable operators note that adoption of a unified rate, by itself, may not achieve a level playing field and produce the desired stimulus to deployment of broadband services.[10]

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[5] Knology Comments at 6.

[6] Comment of Alabama Power Co., Georgia Power Co., Gulf Power Co. & Mississippi Power Co., WC Docket No. 07-245 *et al.*, at 17-18 (filed Mar. 7, 2008).

[7] AT&T Comments at 20.

[8] Zayo Bandwidth Entities Comments at 6.

[9] *See Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245 *et al.*, *Notice of Proposed Rulemaking*, FCC 07-187, at ¶¶ 26-36 (rel. Nov. 20, 2007) ("*NPRM*").

[10] Comcast Comments at 52.

Notwithstanding the strong degree of agreement on the advisability of a unified rate, commenters have widely divergent opinions on what that rate should actually be. It is evident from the comments submitted on behalf of electric utilities that pole owners consider both rates, the telecommunications rate as well as the cable rate, to be too low. Edison Electric Institute ("EEI") and the Utilities Telecom Council ("UTC"), in their joint comments, refer to the "subsidized access rates" received by cable television providers and CLECs, and suggest the Commission adopt an "improved" version of the telecommunications formula as a single rate.[11] Because the elimination of the alleged subsidies is a principal theme of those comments, it can only be assumed that the "improvement" suggested by EEI and UTC would be an increase in the maximum rates, above those currently allowed by the Commission for telecommunication service providers.

Comment from cable operators strongly rebut the allegation that electric rate payers are being required to subsidize the telecommunications and cable industries. Comcast, for example, notes that "the Commission, the courts and the states have all previously and uniformly rejected the utilities' contention that the regulated rates constitute a subsidy to cable."[12] Similarly, the National Cable & Telecommunications Association ("NCTA") states that "[i]n the three decades since Congress started regulating pole attachment rates, there is not a single agency or court decision finding that the cable formula produces a rate that is confiscatory for purposes of the Taking Clause of the Fifth Amendment."[13] Even so, the pole owners continue to make the

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[11] EEI/UTC Comments at 19.
[12] Comcast Comments at 4.
[13] NCTA Comments at 12.

argument that subsidies exist, even for attachments under the telecommunications formula, which produces substantially higher rates.[14]

Another fact ignored by the utilities is the assistance from governments that they, themselves, required in order to develop their pole networks. As noted by at least one appellate court, utilities "received substantial assistance from state governments in acquiring their networks. States routinely delegated to utilities their sovereign power of eminent domain so that they could acquire the needed rights-of-way. In addition, states allowed utilities to locate their network facilities, *e.g.*, poles, on public rights-of-way."[15] In short, access to utility poles has never been a purely market-driven proposition, most notably for the pole owners themselves.

Comments from most telecommunications providers, including both ILECs and CLECs, expressed the need for moderate rates, in order to expand the availability of broadband facilities.[16] AT&T points out some of the ways in which the existing rate formulas unreasonably escalate the cost of pole attachments to both cable operators and telecommunications carriers.[17] For example, AT&T notes that both formulas include the cost of all poles in calculating the pole owner's total pole costs, even though there is no logical or reasonable basis for requiring attachers occupying one foot of space on a pole to help defray the cost of a 50-, 60-, or 70-foot pole, or other unusual pole types that are placed by the electric utilities solely to serve their own needs.[18]

With respect to this single most appropriate rate, the most thoroughly documented position is taken by those commenters who advocate a maximum rate fixed under the current

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[14] EEI/UTC Comments at 43-45.

[15] *Gulf Power Cop., v. United States*, 187 F.3d 1324, 1326 (11th Cir. 1999).

[16] *See, e.g.,* AT&T Comments at 10-22; Verizon Comments at 3-6; TWTC/One/COMPTEL Comments at 4.

[17] AT&T Comments at 18-21.

[18] *Id.* at 20.

formula established for cable operators. The Commission has expressed doubt about this approach when questioning in the Notice of Proposed Rulemaking the "assertion that the cable rate should apply to all pole attachments, particularly because ... the cable rate does not include an allocation of the cost of unusable space."[19] In fact, the Commission's cable rate formula does allocate the cost of unusable space, and does so according to a just and reasonable apportionment plan, as required by Section 224. Under the applicable paragraph of the statute, the maximum rate is derived by multiplying the percentage of the total usable space ... occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole... ."[20] Obviously, the entire pole includes both usable and unusable space, so it is simply incorrect to say that the cable rate does not include an allocation of the cost of unusable space.[21]

The logic behind the apportionment of unusable space in the telecommunications formula is far from apparent. The relevant section of the statute provides that "a utility should apportion the cost of providing [unusable] space on a pole ... so that such apportionment equals two-thirds of the costs of providing [unusable space] that would be allocated to such entity under an equal apportionment of such costs among all attaching entities."[22] Under that formula, the smallest CLEC that utilizes one foot of pole space contributes to the cost of unusable space at a rate that is two-thirds the rate of an ILEC who may utilize three feet or more, or an electric utility that may have more than ten feet of space on an over-sized pole. Such a result cannot meet the mandate set forth in the immediately preceding paragraph of the same statute; which is that the

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[19] *NPRM* at ¶ 22.
[20] 47 U.S.C. § 224(d)(1) (emphasis added).
[21] *See* Comcast Comments at 13.
[22] 47 U.S.C. § 224(e)(2)

Commission's regulations "ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments."[23]

B. ILECs And Their Affiliates Should Not Be Allowed To Benefit From Regulated Rates Under Section 224, But If The Commission Determines That ILECs Are Entitled To Such Rates, The Benefit Should Apply Strictly To Poles, And Not To Conduit

In their comments, several ILECs and their representatives object to the their lack of explicit rights under Section 224, which they claim results in a disparity between the rates they pay for attachments to utility-owned poles and the rates paid by their competitors.[24] AT&T claims in its comments that it is being required by electric companies to defray 40 to 50 percent of the poles' annual costs, even though it is now using approximately the same amount of space as its competitors.[25] USTelecom refers to the disparate treatment of ILECs as a "regulatory handicap."[26] To correct this alleged problem, ILECs ask the Commission to revise its traditional belief (and the common understanding throughout the communications industry) that ILECs are not within the category of "providers of telecommunications services" entitled to the protection of regulated rates under Section 224.[27]

Electric utilities and their representatives argue strongly in their comments that Section 224 explicitly excludes ILECs from claiming the right to rates set by statute.[28] However, utilities also argue against the ILECs' point of view on policy grounds. In the electric utilities'

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[23] *Id.* at § 224(e)(1).

[24] *See, e.g.,* CenturyTel Comments at 12; Comments of United States Telecom Association ("USTelecom"), WC Docket No. 07-245 *et al.*, at 7 (filed Mar. 7, 2008) ("USTelecom Comments").

[25] AT&T Comments at 6.

[26] USTelecom Comments at 3.

[27] *See, e.g.,* Frontier Comments at 3.

[28] *See, e.g.*, Comments of Edison Electric Institute and Utilities Telecom Council ("EEI/UTC"), WC Docket No. 07-245 *et al.*, at 48 (filed Mar. 7, 2008) ("EEI/UTC Comments"); Comments of Pacificorp, Wisconsin Electric Power Co., & Wisconsin Public Service Corp. ("Pacificorp *et al.*"), WC Docket No. 07-245 *et al.*, at 3-7 (filed Mar. 7, 2008) ("Pacificorp *et al.* Comments").

view, if the rate formula applicable to telecommunications carriers were to become applicable to ILECs, pole owners would receive substantially less for their attachments.[29] This, the utilities claim, would exacerbate the already existing problem of electric power consumers having to subsidize the communications industry. The electric utilities do not address the appellate court rulings that have found no subsidies to exist.[30]

Like the pole owners, many competitive carriers oppose the extension of regulated rates to ILECs.[31] Utility poles are a fundamentally important resource to competitive telecommunications providers. As widely recognized, poles are structural assets that would be nearly impossible to duplicate.[32] Virtually all of these assets are owned by electric utilities and ILECs, one-hundred-year-old monopolies that have extraordinary bargaining power. When enacting the Telecommunications Act of 1996, Congress understood that just and reasonable pole attachment rates could not be attained through ordinary arm's length negotiations between such monopolies and the fledgling enterprises that were entering the telecommunications marketplace. The situation was summed up succinctly by Justice Kennedy in the case *National Cable & Telecommunications Association v. Gulf Power Co.*, when he said "[s]ince the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge

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[29] Comments of Utilities Telecom Council, White Paper Appendix , *The Problem with Pole Attachments* at 22 ("UTC White Paper").

[30] *See, e.g.,* Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245 *et al.*, at 12-13 & App. A (filed Mar. 7, 2008).

[31] Comments of Alpheus/360networks, WC Docket No. 07-245 *et al.*, at 4-5 (filed Mar. 7, 2008); ("Alphues/360 networks Comments"); Comments of segTEL, Inc. ("segTel"), WC Docket No. 07-245 *et al.*, at 16 (filed Mar. 7, 2008) ("segTel Comments"); Zayo Bandwidth Entities Comments at 3.

[32] *See, e.g.*, AT&T Comments at 3; Comments of WOW! Internet Cable & Phone, WC Docket No. 07-245 *et al.*, at Att. 2 (filed Mar. 7, 2008) ("WOW! Comments").

monopoly rents."[33] As was obviously understood by the court, the underlying reason for replacing arm's length negotiation with regulation of rates was that the cable companies could not hope to negotiate effectively with pole owners who had near monopoly power. What the ILECs fail to address in their comments is that they, like the electric utilities with which they negotiate, have near monopoly power, and no lack of bargaining prowess. Their position is fundamentally different than the cable companies and competitive telecommunications providers to whom Section 224 is applicable. Accepting, for the sake of argument, that ILECs own a decreasing percentage of the poles across the nation, ownership of fifty percent is not necessary to have nearly equal bargaining power. Even if an ILEC utility owns just ten percent of the poles in a market, that small ownership interest provides ample bargaining power when the party with whom you are bargaining needs that ten percent. Moreover, strengthening the bargaining power of ILECs with respect to the electric utilities would be to give them a cost advantage over their competitors, which are the cable companies and competitive telecommunications providers. As pointed out by at least one commenter, if ILECs could utilize the Section 224 rate structure, they would gain an overall cost advantage by being able to pick and choose between arm's length negotiation with a pole owner and reliance on the formula, depending on which would be most advantageous in a particular circumstance.[34] Competitive telecommunications companies, which have no markets in which their bargaining power is even remotely equivalent to the ILECs or the electric utilities, could not duplicate that advantage.

Finally, ILECs advocating their acquisition of rights under Section 224 have addressed the question as if it would only apply to their relationships with electric utilities. In fact, the definition of pole attachments includes not just attachments to poles, but also to ducts, conduits

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[33] 534 U.S. 327, 330 (2002).
[34] segTEL Comments at 16.

and rights-of-way.[35] Competitive telecommunications carriers are rightly concerned that one of the ILECs' goals in advocating for rights under Section 224 is to acquire access to their competitors' conduit at regulated rates.[36] That result would turn Section 224 on its head, providing a cost conserving tool to the traditional monopoly carrier at the expense of competitors. That outcome must not be permitted by the Commission.

C. The Commission Should Adopt By Rule Certain "Best Practices" That Were Proposed In This Proceeding.

The comments reveal strong support by competitive telecommunications carriers for the specific "best practices" suggested by Fibertech Networks, LLC. Specifically, Fibertech proposes that the Commission should:

- Adopt a rebuttable presumption to allow use of boxing or extension arms where such a technique would avoid the need for make-ready work and where facilities on the pole are accessible by ladder or bucket truck.
- Establish shorter survey and make-ready time periods.
- Where pole owners cannot meet applicable make ready deadlines, allow the license applicant to either (a) hire utility-approved contractors directly or (b) use NESC-compliant temporary attachments.
- Reaffirm by rule that attachers can install NESC-compliant drop lines to satisfy customer service orders without prior licensing or pole owner approval.
- Require conduit owners to permit CLECs to conduct manhole surveys and record searches.
- Cap conduit owners' fees for searches and surveys at reasonable levels.
- Require pole and conduit owners to provide sufficiently detailed documentation for any charges to competitors based on utility costs of performing surveys or make-ready work.

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[35] 47 U.S.C. § 224(a)(4).

[36] *See* Zayo Bandwidth Entities Comments at 4.

- Permit CLECs to use utility-approved contractors to work in manholes without utility supervision.

- Require ILECs to provide CLECs with reasonable access to building-entry conduit.

In their comments, many competitive telecommunications carriers endorsed all or most of Fibertech's proposals without change.[37] The supportive comments of these competitors contrasted to those of electric utilities, which generally expressed opposition to the Fibertech proposals, either in comments filed in this docket or in their response to the Commission's *Public Notice* distributed in 2005.[38] The argument over extension arms and "boxing" of poles is illustrative of the difference in opinion over practices designed to increase the available space on existing poles. Extension arms increase the available space by providing horizontal clearance between cables when vertical clearance is not available. In their joint comments, Pacificorp, Wisconsin Electric Power Company and Wisconsin Public Service Corporation criticize the proposal to allow use of extension arms and boxing of poles because they do not add strength to the poles or provide *vertical* clearance, because they may preclude climbing of the poles, and also because they present practical difficulties when a pole needs to be replaced.[39] The most provocative of the pole owners' arguments involves clearance, because it suggests that vertical clearance is needed for purposes of safety. However, this ignores the fact that if vertical clearance is required for reasons of safety, reliability or generally applicable engineering

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[37] Alpheus/360networks Comments at 2-4; Comment of CURRENT Group, L.L.C., WC Docket No. 07-245 *et al.*, at 2-3 (filed Mar. 7, 2008) ("Current Group Comments"); WOW! Comments at Attachment A, 3-8; Erramtum Comments of the Zayo Bandwidth Entities, WC Docket No. 07-245 *et al.*, at Att. A, 2-6 (filed Mar. 7, 2008).

[38] *See, e.g.,* Pacificorp *et al.* Comments at 27-31; *see, also e.g.*, Comments of United Telecom Council and the Edison Electric Institute, RM-11303 (filed Jan. 30, 2006).

[39] Pacificorp *et al.* Comments at 27-29.

purposes, the proposal to permit boxing or extension arms would not be applicable.[40] Nothing in the proposed "best practices" is proposed to trump a safety or reliability consideration. Even so, the utilities cannot deny that the National Electrical Safety Code ("NESC") permits horizontal and lateral clearances in many circumstances. Moreover, the telecommunications industry's manual of construction practices, known as the "Telcordia Blue Book," provides that "[c]able extension arms or standoff assemblies may be used to support cable, when necessary, to accomplish the following: ... Providing space for an additional cable where that space cannot be provided without replacing the pole."[41]

Pole owners have every incentive to disallow techniques that conserve space in the communications zone. The Commission's rules require that when a pole must be modified or replaced due to a lack of space, the benefitting party must assume the cost of the modification or replacement.[42] Other users who share in the benefit also contribute, but the pole owner inevitable benefits because an old pole is replaced with a new one, even if no additional space is acquired. However, in reality the increments of pole sizes when a pole is modified or replaced almost always result in additional space created for expansion, which the pole owner either uses for its own purposes or rents to another attaching party.[43] The ability of the pole owner to use that additional space for its own purposes or to rent to another attaching party creates a windfall for the pole owner because the cost of replacing the pole was already recovered from the new attaching party.

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[40] *See* 47 U.S.C. § 224(f)(2).

[41] Telcordia Manual of Construction Procedures, Special Report SR-1421, Issue 3, December 1998 at § 3.3.

[42] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, *First Report and Order*, 11 FCC Rcd. 1549, 16095 ¶ 1211 (1996).

[43] *Id.* at 16098 ¶ 1216.

The use of extension arms is a common industry practice of conserving space and avoiding the replacement of poles, as is attachment of facilities to the back sides of poles (the so-called "boxing" technique). Competitive telecommunications carriers should not be required to fight this battle again and again with pole owners. Commenters have shown that pole owners engage in boxing of poles when it fulfills their own purposes, which is why they do not advocate for a ironclad ban.[44] However, it is the lack of consistency that results in delay and uncertainty for attaching parties. The Commission has heard the parties' arguments and should endorse the proposal to allow use of boxing or extension arms where such a technique would avoid the need for make-ready work and where facilities on the pole are accessible by ladder or bucket truck. These are reasonable methods for new competitors to conserve funds that would otherwise have to be spent on extensive make-ready work and replacement of poles.

Apart from the issue of pole boxing and extension arms, the proposed "best practices" relate to two themes: (a) reasonableness of pole owners' fees for services and (b) avoidance of delay. With respect to pole owner fees for searches, surveys and make-ready services, commenters in this proceeding report charges that bear no relationship to the actual cost of the work.[45] The proposal by Fibertech Networks, LLC that "caps" be placed on fees is desirable, although establishing such caps will be a difficult task. Accordingly, it is highly important that the Commission adopt Fibertech's proposed "best practice" that sufficiently detailed documentation be provided in each case where a utility imposes charges on pole attachers that are based on utility costs of performing surveys or make-ready work. Not only would the

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[44] *See, e.g.,* Comments of Fibertech Networks, LLC and Kentucky Data Link, Inc., WC Docket No. 07-245 *et al.*, at 16-17 (filed Mar. 7, 2008); segTEL Comments at 8-9.

[45] *See, e.g.*, segTEL Comments at 7; Comments of Sunesys, LLC, WC Docket No. 07-245 *et al.*, at 8-9 (filed Mar. 7, 2008); TWTC/One/COMPTEL Comments, at Declaration of Robert Legg, 2-3.

detailed invoices deter charging of unsupportable fees, but they would also provide the formal record upon which an attaching party's complaint to the Commission could later be based.

Nothing in this rulemaking inspired more spirited comments by competitive telecommunications carriers than the issue of delays in conducting surveys and make-ready work. The plea for assistance from the Commission can be found in the comments of numerous entities.[46] Even so, the pole owners are so insensitive to the issue of delay that the evidence of unreasonable conduct is actually included in their comments. For example, Oncor Electric Delivery Company ("Oncor") states that weather conditions and third-party attacher delays could make it impossible to implement the proposed best practice of completing pole surveys and make-ready identification work within thirty days, with actual make-ready work completed within an additional forty-five days. Oncor goes on to say, "[i]n an effort to address such uncontrollable factors, Oncor's pole attachment agreements allow an attacher to submit no more than ten (10) permit applications collectively requesting a total of no more than one hundred twenty (120) attachments within any thirty day period."[47] Under such a rule, described unabashedly by Oncor, the maximum number of attachments that could be applied for in a 12 month period is 1440. Assuming for purposes of illustration that a one mile cable run in an urban area requires attachments to 55-60 poles, 1440 poles would constitute a mere 25-mile network, barely enough to scratch the surface in any large metropolitan area.

Oncor's limit on the number of applications filed in a single month is an unreasonable bottleneck. If Oncor can take up to one year to even accept 1440 applications for filing, and

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[46] *See, e.g.,* Comments of Cavalier Telephone, LLC, WC Docket No. 07-245 *et al.*, at 7 (filed Mar. 7, 2008); segTEL Comments at 4-7; Alpheus/360networks Comments at 2; Crown Castle Solutions Corp. Comments at 7.

[47] Comments of Oncor Electric Delivery Co., WC Docket No. 07-245 *et al.*, at 15 (filed Mar. 7, 2008).

further delay their responses to those applications for up to 45 days each, and then be subject to no legal limitation at all as to the amount of time required to actually perform the make-ready work, then Oncor has an effective right to stop competition in its tracks.

Elsewhere in its comments, Oncor reports its belief that it will soon discover up to 30,000 unauthorized attachments to its poles.[48] If true, the seriousness of Oncor's unauthorized attachment problem cannot be minimized. However, if competitive service providers are confronted with an application process that can take years to navigate, all the while being denied the ability to get into business, the fact that some have resorted to normally unacceptable practices is perhaps understandable.

Oncor states without apology in its comments to the Commission that it retains the contractual right to impose a 120-attachment-per-month bottleneck on telecommunications carriers and cable operators. That fact is evidence of why "best practices" are needed.

The Commission should also recognize that these Fibertech's proposed "best practices" are only a beginning. Mandating those practices should be followed up with workshops to address the additional comments that suggest additional problems and proposed practices that would lead to solutions. Such workshops may be more effective than a formal rulemaking to encourage discussion and mutual problem-solving between pole owners and attaching parties.

III. CONCLUSION

The vibrant responses of the Commission's Pole Attachment NPRM are evidence of the need for reform, and make clear that the Commission has undertaken an important effort in this proceeding. After several years of deliberate progress in gathering information about pole attachment rates and the process for gaining access to poles, the Commission should not allow the wealth of data and opinion now available to lose its currency. This is particularly important

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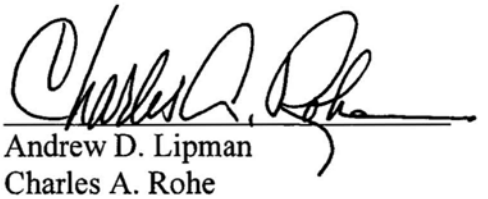
[48] *Id.* at 14.

in the case of the proposed "best practices," which would assist competitors in gaining access to poles. The proposed best practices have been subjected to two separate rounds of comments by the Commission, and should now be adopted.

The weight of arguments in this proceeding favors the establishment of a unified maximum rate for attachment to poles, based on the current formula for cable operators. Pole owners' claims that the regulated rates constitute a subsidy of the communications industry by electric power customers are unproven, and are the product of a desire to reap monopoly financial returns on poles and rights-of-way that were acquired by these private entities for the public good, and with the assistance of government.

Notwithstanding the claim of reduced bargaining power for ILECs, the Commission should refrain from providing the traditional monopoly telephone companies with benefits of Section 224 that were designed to protect new competitors. Most importantly, if the Commission finds it appropriate to extend the benefits of Section 224 to ILECs, those benefits should apply only to poles, and not to conduit. The alternative is to risk turning Section 224 on its head, requiring new competitors to lease facilities to the ILECs at regulated rates.

Respectfully submitted.



Andrew D. Lipman
Charles A. Rohe
Brett P. Ferenchak
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

Counsel for
segTEL, Inc.
The Zayo Bandwidth Entities
360networks (USA), Inc.

CERTIFICATE OF SERVICE

I, Nguyen T. Vu hereby certify that on this 22nd day of April, 2008, I have caused to be served a true and correct copy of the foregoing Reply Comments of segTEL, Inc., The Zayo Bandwidth Entities, and 360networks (USA), Inc. by electronic filing on the following:

Competition Policy Division, WCB
Federal Communications Commission
Room 5-C140
445 12th Street, S.W.
Washington, D.C. 20554
cpdcopies@fcc.gov

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Portal II
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Room CY-B402
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fcc@bcpiweb.com